In the Supreme Court of the United States

OCTOBER TERM, 196[illegible]

No. 1126

SAM NICK FARINELLA and WILLIAM JOSEPH DARA,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. C) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1969. A petition for rehearing was denied on February 6, 1969. The petition for a writ of certiorari was filed on March 7, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether the evidence was sufficient to support petitioners' convictions for robbery and attempted extortion in violation of the Hobbs Act.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioners together with one Esperti were convicted on two counts charging robbery and attempted extortion in violation of the Hobbs Act, 18 U.S.C. 1951 (Pet. App. A 1-2, Pet. App. B-1, B-2; the statute is set forth at Pet. 3-5).[1] Petitioner Farinella was sentenced to concurrent terms of ten years' imprisonment. Petitioner Dara was sentenced to concurrent prison terms of seven-and-one-half years. The court of appeals affirmed (Pet. App. C).

The evidence showed that Jack Maloney and Joe Yeager had a profit-sharing interest in Red Ball Merchandising Corporation, a Hialeah, Florida business dealing in the marketing of close-out merchandise. Approximately ninety percent of Red Ball's customers and suppliers were from other states (Tr. 182-186).[2]

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[1] Petitioners were acquitted on two counts charging extortionate conduct on September 14, 1966. The jury also acquitted them on a conspiracy count, in which they were named with Esperti and two other co-defendants.

[2] "Tr." refers to the transcript of proceedings at trial, a copy of which is on file with the Clerk of this Court.

On September 13, 1966, Maloney was in his office preparing a bank deposit slip for a $2000 cash deposit received on a sale by Red Ball to a Chicago customer (Tr. 186-189). He walked into Yeager's office and there saw petitioners and Esperti. Yeager and an employee of Red Ball named Waldorf were also in the office. Esperti threw Maloney on a couch and told him that they were "here to get the other $25,000 for the man in New York" (Tr. 190-193). Esperti and Farinella both brandished guns. Esperti put his gun alternatively to the heads of Maloney and Yeager and repeatedly demanded immediate payment of the $25,000 (Tr. 193). Petitioner Dara, who had left the room, then returned with the $2000 cash and deposit slip from Maloney's office, remarking "Look what I found". Esperti took it from him, adding "This don't count toward the $25,000" (Tr. 120-122, 194-195). Petitioner Farinella stated: "You've got a lot of merchandise out there. Sell it. Get the money" (Tr. 123, 196). Petitioners and Esperti then departed with the $2000.

ARGUMENT

Petitioners contend (Pet. 10, 14) that there was no evidence to support a finding either that they intended to steal the $2000 or that they relied on fear or threats of force. The contention is frivolous. The money belonged to Red Ball; as the court of appeals held, it was taken, with petitioners' knowledge and participation, "from the Red Ball personnel against their will by means of the threatened force of the guns brandished by Farinella and Esperti" (Pet. App.

C, 4). This amounted to "robbery" as defined by the statute.[3]

Petitioners also contend that the proof was insufficient to show that interstate commerce was affected by the robbery and attempted extortion. See *Stirone* v. *United States*, 361 U.S. 212. As the court of appeals held, however (Pet. App. C, 5), "it was not necessary to show that any particular shipment of merchandise moving to and from Red Ball was obstructed or delayed". The depletion of Red Ball's resources caused by the robbery permitted the inference that its operations (ninety percent of which were with out-of-state suppliers and buyers) were thereafter obstructed or delayed. *United States* v. *Provenzano*, 334 F. 2d 678, 692-693 (C.A. 3), certiorari denied, 379 U.S. 947.

The same answer may be given to petitioner's contention that attempted extortion cannot be a violation of the Hobbs Act because "any threat would relate to events to occur in the future and could not have a present effect on commerce" (Pet. 15). Under the statute, Congress indicated its intent to punish both specified criminal acts which affect commerce and attempts to commit such acts which if successfully completed would affect commerce. *E.g. United States*

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[3] The argument (Pet. 13) that Esperti's statements were improperly received in evidence against petitioner Dara under *Bruton* v. *United States*, 391 U.S. 123, is without basis. Bruton concerned the admission into evidence at a joint trial of the confession of one defendant implicating a co-defendant. Esperti's statements were not admissions or confessions but were verbal acts constituting elements of the joint crime. *Warszower* v. *United States*, 312 U.S. 342, 347-348; compare *Opper* v. *United States*, 348 U.S. 84.

v. *Pranno*, 385 F. 2d 387, 389-390 (C.A. 7), certiorari denied, 390 U.S. 944; see also *United States* v. *Kramer*, 355 F. 2d 891, 897 (C.A. 7), partially vacated and remanded on other grounds, 384 U.S. 100. Here the evidence clearly supported the conclusion that commerce would have been affected had Red Ball's merchandise been sold, as petitioner Farinella directed, to raise the $25,000 demanded.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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